

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In re, UNITED STATES OF AMERICA, :

Petitioner, :

-----x

SOCIALIST WORKERS PARTY, et al., :

Plaintiffs-Appellees, :

- v - :

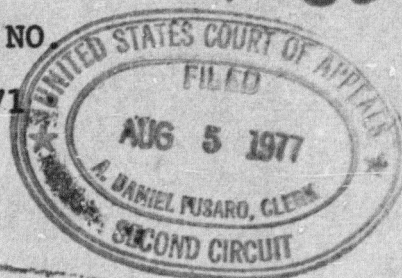
THE ATTORNEY GENERAL, et al., :

Defendants-Appellants. :

-----x

DOCKET NO.

77-8271



ON MANDAMUS AND APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF THE UNITED STATES OF AMERICA

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REPLY OF THE UNITED STATES OF AMERICA

Preliminary Statement

In answering defendants' petition, plaintiffs have advanced no valid reason to sustain the wholesale disclosure of informants' identities ordered by the District Court. Instead, they seek to minimize the seriousness of the District Court's procedure, which threatens the Government's ability to utilize informants in both criminal and civil investigations, by suggesting that it does not go far enough* and should be merely a first step toward public exposure of the identities and files of all 1300 informants. Plaintiffs continue, even

* See Plaintiffs-Appellees' Answer to Petition for Mandamus ("Answer") at 8, 17, 26, 29.

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in this Court, to describe the legal bases for their purported causes of actions involving informant activity in vague and conclusory terms, setting out little more than the names of theories of recovery while ignoring the absence of any legal support for the application of those theories to their claims. Finally, even if plaintiffs were found to have valid claims with respect to informant activity, plaintiffs have totally failed to demonstrate that such claims could not be litigated without the disclosure ordered by the District Court.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE DISTRICT COURT'S PROCEDURE FULFILLS ANY LEGITIMATE NEED FOR DISCLOSURE

After more than four years of protracted litigation plaintiffs still cannot articulate the legal bases for their supposed claims with respect to informant activity. Their principal theory of recovery, namely that violations of the First Amendment are actionable under the Federal Tort Claims Act ("FTCA"), simply finds no support in the case law.*

* None of the cases cited by plaintiffs even consider this theory much less sustain it. See Answer at 27, n.23. The two principal cases involving the FTCA, Indian Towing Co. v. United States, 350 U.S. 61 (1955) and Myers and Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2d Cir. 1975) do not even provide support by analogy since they hold only that the FTCA allows recovery for negligence, an obvious tort under state law, regardless of whether a particular act of negligence could only be committed by government employees. Unlike negligence, however, the First Amendment has not been found to be a basis for liability under state tort law. In short, plaintiffs' principal claim for damages must fail because the Government "still remains immune to suit." Bivens v. Six Unknown Agents, 403 U.S. 388, 410 (1971) (Harlan, J. concurring).

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Similarly, plaintiffs reference to the New York State Constitution, Art. I, Sec. 8 as a basis for recovery under the FTCA is without merit since that provision by its terms constitutes a limitation on the power of the State of New York and does not create liability for the acts or omissions of a private party, a prerequisite to any valid claim under the FTCA. See 28 U.S.C. § 1346(b). Finally, plaintiffs list several other supposed causes of action yet neither cite any authority in support of these claims nor even address the Government's arguments on their lack of merit.*

If this litigation is ever to become manageable, these threshold legal questions must first be resolved.** Since the District Court has sought to resolve the informant question without addressing these fundamental legal issues, the Government has no alternative but to raise them on mandamus, which, despite plaintiffs' arguments to the contrary, is clearly proper.*** See Metros v. United States District

* See Answer at 25 and Petition and Brief of the United States of America ("Petition") at 63-84.

** A resolution of these issues would, of course, not prevent plaintiffs from litigating the other claims, unrelated to informant activity, which they assert in this action and which they discuss at some length in their Answer.

*** The District Court has expressly refused to issue a written opinion on any of these questions. See Transcript of July 29, 1976 at 78.

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Court, 441 F.2d 314 (10th Cir. 1971). Indeed, since these legal issues involve the very subject matter jurisdiction of the District Court under the FTCA they can certainly be raised on mandamus. See Truck Drivers Local Union No. 807 v. The Bohack Corp., 541 F.2d 312 (2d Cir. 1976).

In light of its obvious impact on the question of informant disclosure, early resolution of these legal issues, including the Government's argument that plaintiffs' claims prior to October, 1974 are barred by the statute of limitations embodied in 28 U.S.C. §2401(b), is particularly appropriate. If, as plaintiffs argue, the statute of limitations issue cannot be decided without resolving a question of fact, District Court should hold a separate hearing on any disputed fact concerning this defense, as is done in other complex litigation, since that might well resolve the present controversy with respect to a substantial number of informants. See, e.g., Winchester Drive-In Theatre, Inc. v. Twentieth Century-Fox Film Co., 35 F.R.D. 141 (N.D. Calif. 1964); Taxin v. Food Fair Stores, Inc., 24 F.R.D. 457 (E.D. Pa. 1959).*

Similarly, plaintiffs assert that they have claims for interference with prospective advantage due to loss of members, dues and fees (Answer at 25, 26), but cite no case

* See Manual for Complex Litigation, ¶1.80 (1973) which points out how an early resolution of a defense based on statute of limitations can effectively narrow discovery. The District Court, however, has expressly refused to undertake such an effort at simplifying issues. (142a).

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which applies this tort beyond the commercial context (see Petition at 68-71). Moreover, even if they had a valid claim, it hardly requires disclosure of informants' identities. Rather, it requires plaintiffs to produce members who resigned or prospective members who refused to join or contribute because of the presence of informants in the organizations.*

Plaintiffs' argument that informants' identities should be disclosed so that they can recover damages for harm to the two organizations caused by factional disputes or erroneous policies supposedly brought about by informants, likewise, cannot withstand analysis. See Answer at 22-23, 15. First, plaintiffs studiously ignore the fact that in sworn answers to interrogatories, they have categorically denied that SWP or YSA ever suffered a factional dispute that harmed either organization or ever adopted any policy that harmed either organization (782a-783a).** Second, if the interrogatory answers are wrong and plaintiffs are, as they now assert, aware of inexplicable "factual disputes and

* The Government has already sought to elicit this information from plaintiffs by detailed interrogatories. In response plaintiffs merely supplied a disorganized mass of documents though they apparently possess detailed knowledge with respect to these matters (782a).

** The District Court, however, refused to consider how plaintiffs' answers to interrogatories affected the informant question (143a).

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other difficulties which plaintiffs have experienced" (Answer at 22-23 n.21-A; see also 26 n.22), plaintiffs' claim that they need the names of all informants in the hope of connecting some to these unidentified factional disputes and "other difficulties" simply inverts the burden of proof which the privilege places on the proponent of disclosure. At the very least plaintiffs should be required to make some particularized showing, which they have declined to do in the District Court, with respect to these alleged difficulties so that potentially relevant files could be reviewed in camera in light of that showing. They should also be required to demonstrate that the alleged informant involvement cannot be developed by alternative means of discovery.

Plaintiffs' great reliance upon Redfearn's burglaries* and their argument that disclosure of files and identities will deter informant misconduct (Answer at 15 n.15) as bases for disclosure of the eighteen informants' identities is also misplaced. The District Court, after what plaintiffs' characterize as an "exhaustive study" of the 18 informant files, specifically found no evidence of burglaries. In addition, plaintiffs now claim that they need disclosure in order to "connect" informants with certain "unexplained burglaries" which they unveil in their Answer. If plaintiffs have such information, they should be required to make the same particularized showing which the Government or the District Court could then check against the relevant informant files. Certainly plaintiffs' vague allusions do not justify release

* See Answer at 5, 28, 29.

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of many privileged files wholly unconnected with the incidents to which plaintiffs refer.*

Plaintiffs' assertion that the FBI has "withheld the crucial details concerning the scope, extent and impact of informant activity" (Answer at 22) simply overlooks the tremendous volume of information already furnished with respect to the "scope and extent" of informant activity and other matters. Petition at 7, 11-12, 14. Finally, to the extent plaintiffs seek information with respect to informant "impact," that information lies within their own possession.

Plaintiffs also fail to show that they have made adequate use of the materials on informant activity already available to them. For example, plaintiffs have made no serious attempt to take the depositions of FBI agents to whom informants reported.** That these and other alternative

* Plaintiffs' claims for paper and copying costs allegedly caused by informants could presumably be estimated based on plaintiffs' records and information already disclosed by the Government without disclosure of privileged information.

** Contrary to plaintiffs' contentions (Answer at 10), the Government's invocation of the informant privilege did not thwart plaintiffs' discovery in the few instances during depositions of FBI agents in which plaintiffs chose to pursue informant issues. See, e.g., Deposition of George Baxtrum at 48-65. The portions of the deposition transcripts for Raymond Jackson, Donald Harmon, Raymond Ruckel, Robert Shackelford, and William C. Sullivan, cited by plaintiffs, do not even involve the informant privilege.

Plaintiffs' attempts to discredit all alternative methods of discovery by reference to the fact that no interrogatory answers were provided as to Jim Nilson, an informant of short duration whose file was produced to plaintiffs, are unpersuasive since that clerical oversight was promptly corrected. Equally absurd is their reference to the FBI memorandum concerning the SWP branch in Los Angeles which was in fact produced to them on discovery in this case.

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means of discovery might require more effort or expense than the disclosure of informants hardly constitutes a valid basis for the District Court's order. See Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303 (5th Cir. 1972).

II. PLAINTIFFS' HAVE PROVIDED NO JUSTIFICATION FOR THE DISTRICT COURT'S PROCEDURE

Plaintiffs also fail to demonstrate that the District Court's procedure will be of such significant value in the resolution of this case to outweigh the public interest in confidentiality. Rather, plaintiffs advance the wholly meritless contention that the informant privilege does not apply because, they claim, no formal pledge of confidentiality was given. As a matter of law, however, the Government's right to protect its sources of information does not depend upon whether some prescribed ritual was observed. See Roviaro v. United States, 353 U.S. 53, 59 (1957). Moreover, the District Court observed when the Deputy Associate Director of the FBI, Mr. James Adams, testified that:

I have to assume that if, as he [Adams] says, that the principal use of informants is to gain information as he described, I have got to assume there either was pledge of confidentiality or probably should have been. (291a).*

* Plaintiffs' also attempt to question the strength of the informant privilege by reference to a portion of the FBI Manual which merely indicated that informants may be asked to testify for the Government, not, as plaintiff would have it, that this cooperation is subject to public disclosure. (294a).

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Although plaintiffs repeatedly cite the Church Committee report, they ignore the fact that the Church Committee conducted its inquiry into the FBI's domestic intelligence activities, in a manner which would avoid disclosure of any informant's identity.* See Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities; Book III, U.S. Senate, 94th Cong., 2d Sess. 233 (1976). Plaintiffs' reliance on United States v. Fernandez, 506 F.2d 1200 (2d Cir. 1974) is also misplaced. That case merely required the Government to chose between dismissing an indictment and releasing the names of informants found to be critical defense witnesses. Certainly the Court did not announce any redefinition of the privilege itself. Plaintiffs' claim that Fernandez establishes a rule that the privilege exists only when the Government can demonstrate a danger of physical retaliation is inconsistent with other cases and the principal purpose of the informant privilege, which is to protect the public interest in the flow of information to the government and not the private interests of particular informants.** In United States v. Turbide,

* Plaintiffs' reference to a single document concerning the FBI proposal to publicize an SWP member's erstwhile status as an informant adds nothing to their argument since the document makes clear that this individual had chosen to renounce his role as informant, hence there could be no interest in preserving his confidentiality for law enforcement purposes. See Answer at 14.

** Informant identities are regularly protected in civil investigations such as those in the antitrust or Fair Labor Standards Act areas where physical retaliation by the proponent of disclosure may be unlikely.

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Dkt. Nos. 76-1533, 1534 (2d Cir. June 22, 1977) this Court recently applied the privilege without any showing of physical danger. See also Roviaro v. United States, 353 U.S. 53, 62 (1957); City of Burlington v. Westinghouse, 351 F.2d 762 (D.C. Cir. 1965), Black v. Sheraton Corp., 47 F.R.D. 263, 272 (D.C. Cir. 1969). Plaintiffs' attempt to determine the strength of the privilege by reference to broad language from Roviaro about disclosure where informant information may be "relevant and helpful" overlooks this Court's admonition that "Both reason and context, demonstrate that these words are not to be read with extreme literalness," but must be applied in light of the public interest which the informant privilege seeks to protect. United States v. Soles, 482 F.2d 105, 109 (2d Cir. 1973) (Friendly, J.), cert. denied, 414 U.S. 1027 (1973).*

* Plaintiffs' reference to the Westinghouse case, *supra*, as eliminating any significance in the fact that the Government can dismiss a criminal case rather than disclose an informant's identity overlooks the fact that Westinghouse turned on whether private plaintiffs had waived their right to confidentiality as antitrust informants by instituting treble damage actions. Rather than have their status revealed, they, of course had the option of dropping their Clayton Act suits.

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CONCLUSION

The United States of America, respectfully requests that this Court grant its petition for a writ of mandamus or, in the alternative, reverse the order of the District Court entered June 7, 1977.

Dated: New York, New York

July 25, 1977

Respectfully submitted,

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